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No. 84-602

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF ALAMEDA, a municipal corporation,
Petitioner,

vs.

PREMIER COMMUNICATIONS NETWORK, INC.,
a California corporation,
Respondent.

REPLY BRIEF

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REPLY BRIEF

I

THE RECORD

The record clearly does not provide any indication that the tax can or will inhibit the growth of respondent's business. R.B., ft.nt.1. In addition to the FCC and California determinations (Petition pp. 11-12) that a fee charged by local government equal to 5% of subscription television's gross revenues will not inhibit the growth of that industry, Congress has just adopted the "Cable Franchise Policy and Communications Act of 1984." S.B. 66 and H.B. 4103.[1] This Act adds cable to the Communications Act of 1934. Section 622(b) authorizes a 5% franchise fee. The FCC's

[1]The President has signed the bill.

prior determination is now national policy. The tax rate cannot be characterized as "burdensome" or "harsh" without resorting to a comparative analysis which measures the impact of the tax rate by the absence of its application to others. R.B. pp. 2 and 5. That procedure is irrelevant to the rate's actual impact on respondent.

Respondent seeks to avoid national policy by discrediting the analogy between cable subscription television and non-cable (MDS) subscription television. According to respondent, franchise fees are not general fund revenues. R.B., ft.nt.2. That is not true. The tax, in fact, also applies to cable television. Pet. p.7. Cable simply can pay *either* the tax or the franchise, but need not pay both (pay twice). Pet. p.7. In *either* event the money goes to the general fund. As a matter of common law franchises produce general revenue. *See, Arnold Transit Co. v. City of Mackinac Island* (1980) 99 Mich.App. 266; 297 N.W.2d 904-906. The FCC acknowledges that its justification for franchise fees is fictional. "Very little actual regulation on a day-to-day basis goes on after" start up. 46 F.C.C.2d 175, 203. The FCC limited franchise fees in the first place because cities were using them to raise too much "revenue". 36 F.C.C.2d 143, 209. Franchise fees and taxes go to the same general fund to pay for exactly the same items, such as street maintenance and everyone's salaries. The record does not indicate that any special funds are involved. Congress did not find it necessary to create any legal fiction that franchise fees are not general revenues. § 622(b). No such legal fiction *ever* existed. The FCC merely adopted a rationale for limiting franchise fees. Characterizing the use of revenue by the City serves no useful purpose.

The court of appeal did not address itself to *methods* of taxation. Only the burden of the rate is discussed. R.B., p.2.

The record does not indicate that the maximum tax for most businesses is $472.50. R.B., p.2. The court of appeal was merely making a comparison of this tax rate to the in lieu tax *rate,* if applied to respondent.

The record does not justify the tax rate on the basis of revenue purposes only (standing alone). R.B. p.7. Respondent treats tax *nexus* and tax *rates* as synonymous. The tax is a revenue measure. Differences in rates have other purposes behind them as well.

II

RESPONDENT'S RATIONALES DO NOT SERVE FIRST AMENDMENT PURPOSES

We are somewhat shocked at respondent's assertion that this case has nothing to do with prior restraints. R.B., p.4. We have always considered "censorship" and "prior restraints" (at least conceptually) synonymous terms. *Minneapolis Star*[2] discusses the seminal prior restraint cases in reaching its decision. The term "prior restraint" was unnecessary because the Court, for the most part, addresses potential censorship.

Respondent's arguments lack the stated premises necessary for their clear understanding. The one on page 7, in particular, tortures the imagination. Revenue ordinances

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[2]*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* (1983) 460 U.S. 757, 103 S.Ct. 1365.

and police power ordinances treat fees differently. Pure revenue fees (taxes) have no cost of service limitation. Pet., p.9. Fees for the administration of regulatory permits cannot exceed the actual cost applicable to the permittee of administering the (police power) permit system. *See, Cox v. State of New Hampshire* (1941) 312 U.S. 569, 576; 61 S.Ct. 762, 766 and *Chemline, Inc. v. City of Grand Prairie* (5th Cir. 1966) 364 V.2d 721, 727. Consequently, and particularly under California law, business license ordinances contain the revenue only *statement* to insure that they are not subjected to the police power license rule. Respondent assimilates that *statement* to the Court's discussion in regard to satisfying the burden of proof, when shifted (revenue purpose alone insufficient), and concludes that a differential tax rate falls within the *Minneapolis Star* rule. This, at best, *non-sequiture* assumes that the Constitution now requires uniform rates as a condition of taxing first amendment businesses. Stated another way, a differential rate raises a presumption of censorship which requires the taxing agency to show a compelling state interest for a *rate* that does not apply to "business generally". Respondent employs the unstated premise that rates and *nexus* are synonymous, or stated another way, that "burden" is created by either a tax or a tax rate, equally under the Constitution. We believe that those burdens differ constitutionally.

A similar semantic manipulation appears in the next argument. R.B., pp. 7-9. We use "method" and "nexus" synonymously.[3] Respondent uses "method" and "rate" as syn-

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[3]*Nexus* is an awkward term.

onymous terms instead. That stratagem turns our arguments upside down, justifies the court of appeal's error in analysis of burden (which also fails to distinguish rates from *nexus*) and makes "differential treatment," as used in *Minneapolis Star, appear* applicable to rates. Again, the premise assumes the conclusion.

In its final argument respondent, finally, drops its semantic veil and agrees, albeit unwittingly, with us on the real issue in this case. R.B. pp. 9-10. "The press should pay its fair share, but not *more* than its fair share." R.B., p.10. The issue for this Court is: *Who* decides what is their fair share, and how? The courts have *never* made that decision. The "common sense" and "the law" of the Congress of the United States holds that 5% is a fair share for subscription television. Respondent, and the court of appeal have resolved the matter by requiring, *sub silencio,* uniform tax rates. The censorial impact of a tax *rate,* if it exists under the First Amendment, should be a question of fact, as it is under Equal Protection. If the Court adopts, as a premise, the position that differential tax rates are burdensome to the exercise of the First Amendment, only uniform rates will succeed. The fair share burden of proof would prove too expensive a task for agencies and too difficult a task for the courts.

III
CONCLUSION

The bottom line approach of respondent (financial burden) indicates that their concern is *equal treatment,* not censorship. The review of tax rates should be left to Equal Protection and Due Process analysis. Nothing in *Minneapolis Star* justifies the constitutional imposition of uniform or "fair share" tax rates. If the First Amendment is to apply to tax rates, that decision should come from this Court, not from the confusion of a lower court. Certiorari should be granted.

November 20, 1984

Respectfully submitted,

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